



Before: Judge Ebrahim-Carstens, Duty Judge

Registry: New York

Registrar: Hafida Lahiouel

KALASHNIK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION TO PRESERVE
EVIDENCE**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

1. On 26 May 2015, the Applicant filed an application contesting the decision, *inter alia*, not to include him in the roster of qualified candidates for P-4 Resident Investigator positions in the Office of Internal Oversight Services (“OIOS”); his non-selection for various P-4 positions; and the filling of several P-4 positions without advertisement through a job opening and allegedly outside of the competitive process.
2. On the same day, the application was transmitted to the Respondent in accordance with arts. 8.4 and 10 of the Rules of Procedure, granting the Respondent 30 calendar days to submit his reply by 5 p.m. on Thursday, 25 June 2015.
3. On 23 June 2015, before the reply was filed, the Applicant filed a motion requesting leave of the Tribunal to file a 16-page motion for production of evidence by the Respondent, attaching the said 16-page motion.
4. On 26 July 2015, the Respondent duly filed a reply contending, *inter alia*, that the Applicant’s claims have no merit; that the selection processes were conducted in full compliance and the resulting decisions not to select the Applicant were lawful; that the Applicant was fully and fairly considered for the roster; and that the decisions to transfer staff members within OIOS to P-4 positions were lawful.
5. On 7 July 2015, the Tribunal issued Order No. 133 (NY/2015) directing that the Applicant file a response to the Respondent’s reply by 6 August 2015, and placing the Applicant’s motion for production of evidence in abeyance until further notice.
6. Following an extension of time, on 9 September 2015, the Applicant filed a 38-page response to the Respondent’s reply, together with 285 pages of annexes.
7. On 10 September 2015, the Tribunal issued order No. 221 (NY/2015), noting that there are currently more than 50 cases registered prior to the instant matter in the New York Registry awaiting consideration by the Tribunal; and also that in the ordinary course of proceedings, matters of production of evidence, and of discovery and disclosure, are matters that are dealt with by the Judge assigned the case, with a

view to case management in preparation for trial. The Tribunal therefore ordered that the case joins the queue of pending cases, and that Applicant's pending motions for production of evidence, and for discovery and disclosure, be deferred to be dealt with by the Judge assigned the case in due course. Due to formatting and editorial errors, Order No. 221 (NY/2015) was rescinded and was replaced by Order No. 223 (NY/2015) on 10 September 2015.

8. After close of business day on 9 September 2015, therefore effectively on 10 September 2015, the Applicant filed a motion for preservation of evidence by the Respondent, namely the Under-Secretary-General for OIOS's ("USG/OIOS") officially issued desktop and/or laptop and her email database before her imminent separation from the Organization on 13 September 2015.

Consideration

9. Matters of evidence, discovery and disclosure, normally follow much later in proceedings, and are dealt with by the judge who is assigned the case, as it would be that particular judge who normally assesses the relevant and admissible evidence required for the facts and legal issues in question, following case management discussions and orders. In this instance, in anticipation of the imminent departure of the USG/OIOS, the Applicant requests preservation of an entire database, probably including personal information, without any specification as to the nature or relevancy of the evidence required to be preserved.

10. In civil proceedings as distinct from criminal proceedings, a court may grant an injunction for preservation of evidence or a search and seizure order (also known as *Anton Piller* orders in some jurisdictions). Such orders are granted only in cases where certain conditions are satisfied, *inter alia*, there must be an extremely strong *prima facie* case against the respondent, any potential or actual damage must be serious for the applicant, and there must be clear evidence that the respondent has in his possession incriminating documents or items, and that there is a real possibility he may destroy such material before any *inter partes* request or application can be made.

11. The Applicant has not pleaded urgency of this matter in the motion, although the Tribunal notes that the motion for preservation of evidence is filed at the eleventh hour (Thursday, 10 September 2015), when the USG/OIOS is, according to the Applicant, due to separate on Sunday, 13 September 2015, and such that the Respondent will have no reasonable opportunity to respond to the motion in light of the short notice and the copious documentation filed by the Applicant. The substantive application having been filed in May 2015, the Respondent's reply on 23 June 2015, and the Applicant being apparently aware that the USG/OIOS was on a mandate ending 13 September 2015, the motion has not been filed in a timely manner.

12. Amongst the principle reasons the Applicant relies on in support of the motion, *inter alia*, is that the USG/OIOS "upon her separation, will not have access to OIOS official records and her e-mail account, which would disallow her to substantiate and support any of her statements and/or actions"; that unlike current staff members she will not have to cooperate with or participate in the administration of justice; further that the Respondent will have no means to compel this potential witness to tell the truth or ensure that she does.

13. The evidentiary burden of proving any fact that a party relies on falls upon that party. An applicant will not be prejudiced if he discharge his evidential burden in the absence of any uncontroverted evidence on behalf of a respondent. If a party is unable to produce the required evidence to the standard of proof required, the Tribunal may draw an adverse inference, and the scales may be tipped in favour of the other party.

14. The Applicant's concern, however, may be assuaged in several respects. Whilst no party has any means to compel a witness to tell the truth, the Tribunal is assured that Counsel is aware of the professional and ethical duty to preserve and make available all relevant evidence, and trusts that the Respondent will act in good faith in these respects. Furthermore, in terms of art. 17 of the Rules of Procedure, the Dispute Tribunal may make an order requiring the presence of any person or the

production of any document, may order the production of evidence for either party at any time, and may require any person to disclose any document or provide any information it deems necessary.

15. Furthermore, ST/SGB/2004/15 (Use of information and communication technology resources and data) stipulates that:

Section 5

Prohibited activities

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

(a) Knowingly, or through gross negligence, creating false or misleading ICT data;

(b) Knowingly, or through gross negligence, making ICT resources or ICT data available to persons who have not been authorized to access them;

(c) Knowingly, or through gross negligence, using ICT resources or ICT data in a manner contrary to the rights and obligations of staff members;

(d) Knowingly and without justification or authorization, or through gross negligence, damaging, deleting, deteriorating, altering, extending, concealing, or suppressing ICT resources or ICT data, including connecting or loading any non-ICT resources or ICT data onto any ICT resources or ICT data;

(e) Knowingly accessing, without authorization, ICT data or the whole or any part of an ICT resource, including electromagnetic transmissions;

(f) Knowingly, or through gross negligence, using ICT resources or ICT data in violation of United Nations contracts or other licensing agreements for use of such ICT resources or ICT data or in violation of international copyright law;

(g) Knowingly, or through gross negligence attempting, aiding or abetting the commission of any of the activities prohibited by this section.

16. The aforesaid Bulletin, in particular sec. 5.1(c)–(d) and (g), read together with the commentary in the Annex to the Bulletin, confirms protection and preservation of all United Nations data and resources and the obligation of all staff members in this

respect. The Tribunal trusts the Respondent will make the appropriate notifications to ensure compliance with the Bulletin in regard to matters herein.

IT IS ORDERED THAT:

17. In all the circumstances, having considered the above, the motion is denied.

(Signed)

Judge Ebrahim-Carstens, Duty Judge

Dated this 11th day of September 2015